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May 20, 1959
Opinion No. 59-89

REQUESTED BY: Honorable Charles C. Stidham
Maricopa County Attorney

OPINION BY: WADE CHURCH, The Attorney General

QUESTION: May the court suspend the imposition
of sentence upon conviction or plea
of guilty for driving without a valid
license without a prior conviction or
plea of guilty?

CONCLUSION: No, if charged by A.R.S. §28-411, as
amended.

Yes, if charged by A.R.S. §28-471(7).

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It has been held several times by the Arizona Supreme Court that there is no inherent power of a court to suspend the imposition of a sentence.

In Peterson v. Flood, 84 Ariz. 256, 326 P.2d. 845, the following is stated:

"It is well settled in this jurisdiction that the power of a Court to suspend sentence in a criminal case is not an inherent power but exists solely by virtue of statute and may be exercised only in accordance therewith. State v. Bigelow, 76 Ariz. 13, 258 P.2d 409, 39 ALR 2d.979; Smith v. State, 37 Ariz. 262, 293 P.23."

In State v. Bigelow, 76 Ariz. 13, 258 P.2d.409, the court stated as follows:

"Therefore, the power of the superior court relating to the suspension of sentences must be found in the statutes of the state. The superior courts of Arizona possess no inherent power to suspend the imposition or execution of sentences in any case. They have inherent power only to delay the passing of sentence for the purpose of further investigation. Varela v. Merrill, supra; Smith v. State, 37 Ariz. 262, 293 P.23."

Because the authority to suspend a sentence exists only by statute, it logically follows, as stated in Smith v. State, 37 Ariz. 262, 293 P.23, that:

"The right of a court to suspend the pronouncing or execution of a sentence in a criminal case is regulated by statute, and can only be exercised in accordance with the terms of the statute."

The statutory authority for a court to suspend the imposition of sentence is found in A.R.S. §13-1657, "Suspending imposition or execution of sentence; revocation and termination of probation; discharge" and provides, in part, as follows:

"A. If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be subserved thereby, the court may, in its discretion, place the defendant upon probation in the manner following:

1. The court may suspend the imposing of sentence and may direct that the suspension continue for such period of time, not exceeding the maximum term of sentence which may be imposed, and upon such terms and conditions as the court determines, and shall place such person on probation, under the charge and supervision of the probation officer of the court during such suspension."

(Emphasis added)

On March 21, 1959, A.R.S. § 28-411 was amended by having the following added:

"D. Conviction, or forfeiture of bail not vacated, for any violation of the provisions of subsection A, shall be punishable by a fine of not less than fifty nor more than three hundred dollars. A second or subsequent conviction, or forfeiture of bail not vacated, shall be punishable by a fine of not less than one hundred nor more than three hundred dollars, by imprisonment for not less than five days nor more than six months, or both."

It will be noted that there is no provision for a jail sentence for first conviction under A.R.S. §28-411, as amended. The Arizona Supreme Court in Smith v. State, supra, in speaking of the effect of a fine, stated:

"It is evident from the foregoing quotation from the record that the defendant was sentenced only to pay a fine, no alternative of imprisonment for

failure to pay such fine being fixed as part of the sentence. We have held that a sentence of this kind creates merely a civil judgment against the offender to be collected in like manner as other civil judgments, and that he cannot be imprisoned for failure to pay judgment. *Dunbar v. Territory*, 5 Ariz. 184, 50 Pac. 30; Sec. 5116, Rev. Code 1928."

The statutory authority for granting a suspended sentence, A.R.S. §13-1657, as amended, provides that it may be suspended "for such period of time, not exceeding the maximum term of sentence which may be imposed." As stated in *State v. Bigelow*, supra:

"The statute fixing the term of punishment for the crime involved here fixes a minimum and maximum term. Under such statutes the court may impose a sentence for any period of time including the minimum, or any intermediate period between that and the maximum, or it may impose the maximum."

Inasmuch as there is no provision for a jail sentence, there is no period of time for which the defendant could be placed on probation. The question then becomes, "may the court suspend the imposition of sentence without placing the defendant on probation?" This question is discussed in 24 C.J.S. §1618(b)(2), p. 174, as follows:

"The statutes providing for the suspension of the execution of sentences also generally provide for placing on probation the person, whose sentence is suspended, and authority for placing on probation and the limits on such authority must be found in the statute. Under some of these statutes a suspension of execution of sentence may be granted only as an incident to granting and placing accused on probation; if probation is not granted, execution of sentence cannot be suspended, and an order attempting to grant such suspension, without probation, is void. Under other statutes, however, a suspension of execution of sentence does not necessarily include placing on probation, and while, under such statutes, accused cannot be placed on probation without having the execution of his sentence suspended, he may have its execution suspended without being placed on probation, and such a

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suspension is merely a common-law exercise of the court's power without reference to the probation laws."

A reading of A.R.S. §13-1657 shows that our statute authorizes the court to suspend the imposition of a sentence only as an incident to the granting of probation, for it states that the court may "place the defendant upon probation in the manner following" and not "suspend the imposition in the following manner."

In this case there being no provision for a jail sentence, there is no period of time for which a sentence may be suspended pursuant to A.R.S. § 13-1657. To grant the court the authority to suspend the imposition of sentence for a second offense because there is a provision for jail sentence, while denying it for the first conviction, is manifestly unjust. However, it is not the duty of the Attorney General to enact statutes but to interpret them. Accordingly, it is the opinion of the Attorney General that the court may not suspend the imposition of sentence for a conviction or plea of guilty for the first offense of a violation of A.R.S. §28-411, as amended.

Another statute by which an unlicensed driver could be charged is A.R.S. §28-471(7). It provides as follows:

"§28-471. Unlawful use of license

It is a misdemeanor for any person:

* * * * *

7. To do any act forbidden or fail to perform any act required by this chapter."

There not being any penalty provided in A.R.S. §28-471, the penalty for the violation of it is controlled by A.R.S. §28-491 and reads as follows:

"§28-491. Penalty for misdemeanor

A. It is a misdemeanor for a person to violate any of the provisions of this chapter unless that violation is by this chapter or other law of this state declared to be a felony.

B. Unless another penalty is in this chapter or by the laws of this state provided, every person convicted of a misdemeanor for the

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violation of any provisions of this chapter
is punishable by a fine of not more than
three hundred dollars, by imprisonment for
not more than six months, or both."

Inasmuch as this penalty provides for a fine or imprisonment,
or both, the court would be empowered to suspend the imposition of
sentence for a violation of A.R.S. §28-471.

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